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Paper No. 7

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MAR 04 2003

In re Application of  
Foulger, et al.  
Application No. 09/911,216  
Filed: July 23, 2001  
Attorney Dkt. No. EMPIR-024AUS  
For: METHOD OF BACKTRACING  
NETWORK PERFORMANCE

**OFFICE OF PETITIONS**  
DECISION REFUSING  
STATUS UNDER 37 CFR  
1.47(b)

This is in response to the petition under 37 CFR 1.47(b), filed August 24, 2001.

The petition is **DISMISSED**.

Rule 47 applicant is given TWO MONTHS from the mailing date of this decision to reply, correcting the below-noted deficiencies. Any reply should be entitled "Request for Reconsideration of Petition Under 37 CFR 1.47(b)," and should only address the deficiencies noted below, except that the reply may include an oath or declaration executed by the non-signing inventor. Failure to respond will result in abandonment of the application. Any extensions of time will be governed by 37 CFR 1.136(a).

The above-identified application was filed July 23, 2001 without an executed oath or declaration and naming Davis Foulger, John Esposito, William Babcock, Robert McElhaney, and William Minckler as joint inventors. Accordingly, on August 24, 2001, a Notice to File Missing Parts of Application was mailed, requiring, among other items, an executed oath or declaration, and a surcharge for its late filing.

A grantable petition under 37 CFR 1.47(b) requires: (1) proof that the non-signing inventor cannot be reached or refuses to sign the oath or declaration after having been presented with the application papers (specification, claims and drawings); (2) an acceptable oath or declaration in compliance with 35 U.S.C. §§ 115 and 116; (3) the petition fee; (4) a statement of the last known address of the non-signing inventor; (5) proof of proprietary interest; and (6) a showing that such action is required to preserve the rights of the parties or to prevent irreparable damages.

Petitioner lacks items (2), (5), and (6) set forth above.

As to item (2), an oath or declaration for the patent application in compliance with 37 CFR 1.63 has not been presented. Please note that a declaration signed by one other than a named inventor should be executed by a corporate officer, such as the president, vice president, secretary, or treasurer on behalf of and as agent for the non-signing

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inventors. The corporate officer's title and address must be identified in the declaration. If an officer is unavailable to execute the declaration, the declaration may be signed on behalf of the corporation by one whose proof of signing authority has been submitted to the Office, such as the corporation's attorney. See, MPEP 409.03(b). Any renewed petition must be accompanied by a declaration in full compliance with 37 CFR 1.63.

As to item (5), petitioner has presented no evidence of proprietary interest in the above-referenced application. Petitioner must establish that the invention has been assigned to an applicant, that the inventors have agreed in writing to assign the invention to an applicant, or that an applicant otherwise has sufficient proprietary interest in the subject matter to justify the filing of the application. Petitioner must submit copies of employment agreements between the inventors and an applicant or a legal memorandum signed by an attorney familiar with the law of the jurisdiction stating that a court of competent jurisdiction would by weight of authority in that jurisdiction award title of the invention to a Rule 47 applicant.

As to item (6), petitioner has failed to present a showing that such action is required to preserve the rights of the parties or to prevent irreparable damages. Any renewed petition must be accompanied by a statement that status under Rule 47 is necessary to preserve the rights of the parties involved or to prevent irreparable damages to an applicant.

Further correspondence with respect to this matter should be addressed as follows:

By mail:           Commissioner for Patents  
                     Box DAC  
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By FAX:           (703) 308-6916  
                     Attn.: Office of Petitions

By hand:           Crystal Plaza Four, Suite 3C23  
                     2201 S. Clark Place  
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Telephone inquiries regarding this decision should be directed to the undersigned at (703) 305-0310.

  
Alesia M. Brown  
Petitions Attorney  
Office of Petitions  
Office of the Deputy Assistant Commissioner  
for Patent Policy and Projects